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CURRENT LEGISLATION

COMMUNISM AND THE CONSTITUTION—INTERNAL SECURITY ACT OF 1950¹

I

From the moment of its inception the United States has been afforded by the Constitution means of preserving and perpetuating its existence.² Responding to this grant of authority, Congress has periodically legislated to safeguard the nation from internal disintegration as well as from external encroachment.

At the time of the passage of the Internal Security Act there were on the statute books many pieces of legislation which had for their purpose the maintenance of internal order.³ Treason,⁴ espionage,⁵ and sabotage⁶ had been made crimes. These offenses were legislated against to punish the instrumentalities of foreign nations whose activities were somewhat of a military character. To supplement these penal sanctions legislation was enacted to deter those who would interfere with national self-protection in more subtle ways.⁷ Congress, having deemed it inadequate merely to punish inimical conduct, took preventive measures to ferret out and identify persons who as agents of foreign nations were potentially dangerous to the

¹ Pub. L. No. 831, 81st Cong., 2d Sess. (Sept. 23, 1950). This article does not purport to treat every aspect of this rather extensive piece of legislation, but only those which seem to be of a more controversial character.

² U. S. CONST. Art. III, § 3(1) provides: "Treason against the United States, shall consist only in levying War against them, or, in adhering to their Enemies, giving them Aid and Comfort."

U. S. CONST. Art. I, § 8(15) provides that Congress shall have the power to "... provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions."

³ Prof. Zechariah Chafee of Harvard in expressing his opposition to S. 2311 (the Senate version of the Internal Security Act before its adoption) commented that he saw no need for additional legislation in view of the many existing sedition statutes. *Hearings before the Committee on Un-American Activities on H. R. 3903 and H. R. 7595*, 81st Cong., 2d Sess. 2319-21 (1950).

⁴ 18 U. S. C. § 2381 (1948) provided the criminal penalty for the offense of treason in Article 3, Section 3, of the United States Constitution.

⁵ 18 U. S. C. §§ 791-97 (1948).

⁶ 18 U. S. C. §§ 2151-56 (1948).

⁷ 18 U. S. C. §§ 2387-88 (1948). Thus it was made a crime to undermine the morale of the United States Armed Forces. To secure a conviction under Section 2388 for attempting to cause insubordination in the Armed Forces, it is not necessary to show that insubordination actually occurred. *United States v. Kraft*, 249 Fed. 919 (3d Cir. 1918).

security of the country.⁸ Finally, with the realization that there was a growing body of highly militant people within the country who were basically antagonistic to our constitutional form of government, it was made a crime to advocate or teach the necessity or propriety of forcefully overthrowing the government.⁹ Onto this corpus of existing law the Internal Security Act was engrafted. The addition was made because Congress believed that the Communist Party had avoided, and could continue to avoid, successful prosecution under existing law by resorting to secret, conspiratorial methods.¹⁰

II

Implicit in every legislative attempt to regulate conduct in the best interest of the nation at large is the danger of infringing on the constitutional rights of individuals.¹¹ This problem is particularly acute in the field of security legislation because of the grave possibility of violating individual rights of free speech and assembly.¹²

Of course, it has been long recognized that these rights are not absolute. A statute which prohibited the use on city streets of a sound truck which broadcasts loud noises to the disturbance of others has been held valid.¹³ Also, a regulation requiring a group to obtain a license before conducting a parade on a public thoroughfare has been held constitutional.¹⁴ Such limitations as these have been imposed for the promotion of community safety, morals, and convenience. The need for such regulations is easily perceived; objection, therefore, is not strong because of the obvious necessity of harmonizing the diverse and conflicting interests in a complex social mechanism.

However, in the field of security legislation the problems are not so concrete and evident. The American people have long enjoyed an almost unhampered freedom in the exchange of all sorts of political notions. Any attempt by legislation to curtail or channel the

⁸ 52 STAT. 631-33 (1938), as amended, 22 U. S. C. §§ 611-21 (1946) (McCormack Act). The act required the agents of a foreign government to register with the Attorney General and to label their propaganda. For proceedings under the statute, see *Viereck v. United States*, 139 F. 2d 847 (D. C. Cir.), *cert. denied*, 321 U. S. 794 (1944). See also 18 U. S. C. § 2386 (1948) (Voorhis Act of 1940 which required the registration of native groups that participated in military drill).

⁹ 18 U. S. C. § 2385 (1948). This act is popularly referred to as the Smith Act of 1940. Under it were recently convicted eleven leaders of the Communist Party. *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950).

¹⁰ H. R. REP. NO. 2980, 81st Cong., 2d Sess. 2 (1950).

¹¹ *United States v. Butler*, 297 U. S. 1 (1936).

¹² U. S. CONST. AMEND. I: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble. . . ."

¹³ *Kovacs v. Cooper*, 336 U. S. 77 (1949). *But cf. Saia v. New York*, 334 U. S. 558 (1948).

¹⁴ *Cox v. New Hampshire*, 312 U. S. 569 (1941).

flow of this political activity is not so readily accepted as is, for example, legislation penalizing the sale of obscene literature.¹⁵

Faced with this problem in the case of *Schenck v. United States*,¹⁶ Mr. Justice Holmes laid down a rule which has become known as the clear and present danger principle, as an aid in tipping the delicately balanced scales between national security and individual freedom. There he said: "The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."¹⁷ This decision attempted to establish a judicial rule which would secure to the individual the greatest measure of freedom consistent with national self-preservation.

The rule as asserted by Holmes has been adopted in several subsequent decisions,¹⁸ but has not been established as the exclusive test.¹⁹ Thus, in *Gitlow v. New York*²⁰ the Court adopted a broader concept in determining how far a statute might go in qualifying freedom of speech. The test therein applied was the *reasonable tendency* that the conduct or speech would have in producing the illegal result.²¹ Additionally, it has been held that proof of a criminal pur-

¹⁵ It is not suggested that there are different legal criteria in the two fields for determining the constitutionality of a given statute; it is merely submitted that legislation in the field of political speech presents a more complex and difficult problem.

¹⁶ 249 U. S. 47 (1919) (the Supreme Court upheld the conviction of the defendant for conspiring to obstruct recruiting in violation of the Espionage Act of 1917).

¹⁷ *Id.* at 52.

¹⁸ *Hartzel v. United States*, 322 U. S. 680 (1944); *Bridges v. California*, 314 U. S. 252 (1941) (reversed the conviction of the defendant for having criticized a decision of a state court while a motion for a new trial was pending). Justice Black said: "... the substantive evil must be extremely serious . . . before utterances can be punished." *Id.* at 263.

¹⁹ The rule was not followed in *Schaefer v. United States*, 251 U. S. 466 (1920) (Holmes dissenting), nor was it adopted in *Abrams v. United States*, 250 U. S. 616 (1919).

²⁰ 268 U. S. 652 (1925).

²¹ Mr. Justice Sanford said: "The State cannot reasonably be required to measure the danger from every such utterance in the nice balance of a jeweler's scale. A single revolutionary spark may kindle a fire that, smouldering for a time, may burst into a sweeping and destructive conflagration. It cannot be said that the State is acting arbitrarily or unreasonably when in the exercise of its judgment as to the measures necessary to protect the public peace and safety, it seeks to extinguish the spark without waiting until it has enkindled the flame or blazed into the conflagration. It cannot reasonably be required to defer the adoption of measures for its own peace and safety until the revolutionary utterances lead to actual disturbances of the public peace or imminent and immediate danger of its own destruction; but it may, in the exercise of its judgment, suppress the threatened danger in its incipency." *Id.* at 669. Also see *Associated Press v. United States*, 326 U. S. 1 (1945) (defendant made publications in violation of the Sherman Anti-trust Act); *Gilbert v. Minnesota*, 254 U. S. 325 (1920) (conviction sustained under a state statute making it unlawful to obstruct recruiting).

pose, without proof of a clear and present danger, is sufficient to warrant conviction.²²

These decisions cast some doubt on the part the principle will play in freedom of speech cases. Graver doubt is cast on its use in cases concerned with freedom of assembly by reason of the Supreme Court's consistent failure to apply it.²³

Doubt concerning the applicability of the clear and present danger principle persists to the present. A recent decision has made strong reference to it in a case involving a speech by an individual.²⁴ But there is strong indication to the effect that the principle will not receive a literal application in cases involving conspiracy and subversive activities.²⁵

Notwithstanding the unlikely application of the principle, Congress has declared that the Communist Party does in fact present a clear and present danger.²⁶ This declaration was made after many painstaking and exhaustive studies. It was made no doubt because of Congress' consciousness that the Supreme Court does not regard lightly its duty to preserve constitutional guarantees and hence requires impelling reasons for upholding any infringement on them.

The significance of this legislative declaration will be considered as the various provisions of the Act are severally discussed.

III

Sedition

The newly enacted sedition provision of the Act is Section 4-a which makes it unlawful for any person knowingly to combine, conspire, or agree with any other person to do any act which would substantially contribute to the establishment of a foreign-controlled dictatorship in the United States.²⁷ The legislative finding that the

²² *Commonwealth v. Lazar*, 103 Pa. Super. 417, 157 Atl. 701 (1931), *appeal dismissed*, 286 U. S. 532 (1932).

²³ *Cox v. New Hampshire*, 312 U. S. 569 (1941); *Hague v. Committee for Industrial Organization*, 307 U. S. 496 (1939); *De Jonge v. Oregon*, 299 U. S. 353 (1937); *Stromberg v. California*, 283 U. S. 359 (1931).

²⁴ *Terminiello v. Chicago*, 337 U. S. 1 (1949).

²⁵ *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950). The clear and present danger doctrine does not require that the nation await the moment before protecting itself "... when we may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that the chance seems worth trying. That position presupposes that the Amendment assures them freedom for all preparatory steps and in the end the choice of initiative, dependent upon that moment when they believe us, who must await the blow, to be worst prepared to receive it." *Id.* at 213. See *American Communications Commission v. Douds*, 339 U. S. 382, 394 (1950).

²⁶ After recounting the history and methods of the Communist Party in Section 2(1-15) of the Internal Security Act Congress declares in Section 2(15): "The Communist organization in the United States . . . present[s] a clear and present danger to the security of the United States. . . ."

²⁷ INTERNAL SECURITY ACT § 3(15) defines a totalitarian dictatorship as a

Communist Party presents a clear and present danger does not have the effect of making this section applicable to mere membership in the party since the Act expressly provides that membership in any Communist organization is not a violation of the provision.²⁸ The prosecution would have to show that the conduct of the individual defendant tended to produce the illegal result.

While it has been suggested that the government need not wait until the last possible moment to arrest conduct which is calculated to result in its downfall,²⁹ it was not meant that the government could pass legislation which would have the result of depriving an individual of his rights under the First Amendment.³⁰

On first impression it would appear that Section 4-a would effectively stifle free political activity in a rather broad area. If there were no limitation placed on its application it would probably fall as constitutionally defective. Congress, however, cognizant of this problem, placed a general limitation on the construction of the entire Act, namely, that no provision be construed to infringe on freedom of the press or speech.³¹ Further indication that the statute is not directed essentially against free speech may be drawn from an examination of the terminology of the section and the legislative intent.

The words "combine, conspire, or agree with any other person to do any act" hardly seem to be directed against open or public discussion of ideas but rather against covert machinations to undermine the existing system of government.³² The Congress has even provided that the statute shall not prohibit efforts to establish a foreign-controlled dictatorship by constitutional amendment.³³

Congress in studying the need for this legislation clearly recognized a distinction between Communism "as an economic, social and political theory" and "as a secret conspiracy, dedicated to subverting the interests of the United States to that of a foreign dictatorship."³⁴

system of government "... not representative in fact, characterized by (A) the existence of a single political party, organized on a dictatorial basis, with so close an identity between such party and its policies and the governmental policies of the country in which it exists that the party and the government constitute an indistinguishable unit, and (B) the forcible suppression of opposition to such party."

²⁸ *Id.* § 4(f).

²⁹ See discussion under Section II, text, *supra*.

³⁰ See note 12 *supra*.

³¹ INTERNAL SECURITY ACT § 1(b).

³² INTERNAL SECURITY ACT § 4(a) provides: "It shall be unlawful for any person knowingly to combine, conspire, or agree with any other person to perform any act which would substantially contribute to the establishment within the United States of a totalitarian dictatorship . . . the direction and control of which is to be vested in, or exercised by or under the domination or control of, any foreign government, foreign organization, or foreign individual: *Provided, however*, that this subsection shall not apply to the proposal of a constitutional Amendment."

³³ *Ibid.*

³⁴ H. R. REP. NO. 2980, 81st Cong., 2d Sess. 3 (1950).

All these molding factors militate against the section's receiving a construction that would doom it under the First Amendment.

Although the courts have upheld statutes outlawing conspiracy,³⁵ they have been careful to deny validity to statutes which fail to make an adequate distinction between lawful and unlawful conduct.³⁶ Thus, if the section can be construed to penalize acts which are inherently innocent, it would seem it must fall on constitutional grounds.³⁷ However, the above-mentioned qualifications ought to spare it from such a fate. With this qualification on its application, the question arises whether the statute notifies the public as to what conduct is prohibited.

In enacting penal statutes the legislature always faces the task of making the provision broad enough to encompass all the sundry forms that the prohibited conduct might take without making it so broad that it might be deemed vague and hence violative of the essential requirement of due process.³⁸ To determine whether the legislature has met the requirements of due process the test is whether reasonable men are advised by the statute of the nature of the conduct proscribed.³⁹ A standard of guilt must be established by the legislature and cannot be left to the determination of a court or jury.

In enacting a statute the legislature is not constrained to use only legal or technical terminology, but may adopt terms of common usage and understanding.⁴⁰ Thus a number of statutes have been upheld which established illegal conduct in well defined and understood terms of business usage.⁴¹ However, where the terms used impose upon the defendant the task of estimating the legality of his conduct by evaluating numerous fluctuating intangibles, the statute has been held vague and violative of due process.⁴²

³⁵ *Dunne v. United States*, 138 F. 2d 137 (8th Cir.), *cert. denied*, 320 U. S. 790 (1943); *State v. Gilbert*, 141 Minn. 263, 169 N. W. 790, *aff'd*, 254 U. S. 325 (1920); *People v. Most*, 171 N. Y. 423, 64 N. E. 175 (1902).

³⁶ *Bridges v. Wixon*, 326 U. S. 135 (1945); *De Jonge v. Oregon*, 299 U. S. 353 (1937); *Stromberg v. California*, 283 U. S. 359 (1931); *State v. Diamond*, 22 N. M. 477, 202 Pac. 988 (1921).

³⁷ *Stromberg v. California*, *supra* note 36 ("red flag" statute invalidated for penalizing peaceful opposition to government).

³⁸ For an excellent discussion of this problem, see Justice Frankfurter's dissenting opinion in *Winters v. New York*, 333 U. S. 507, 525 (1948).

³⁹ *United States v. Gorin*, 312 U. S. 19 (1941); *United States v. Reese*, 92 U. S. 214 (1875); *United States v. Foote*, 42 F. Supp. 717 (D. C. Del. 1942); *State v. Magaha*, 182 Md. 722, 32 A. 2d 477 (1943).

⁴⁰ *Sproles v. Binford*, 286 U. S. 374 (1932).

⁴¹ *United States v. Shreveport Grain & Elevator Co.*, 287 U. S. 77 (1932) (regulations against misbranding of products); *Hygrade Provision Co. v. Sherman*, 266 U. S. 497 (1925) (regulation against fraudulently representing meat to be "kosher"); *Nash v. United States*, 229 U. S. 373 (1913) (anti-trust law); *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86 (1909) (anti-trust law); *Swift and Co. v. United States*, 196 U. S. 375 (1905) (anti-trust law).

⁴² *United States v. Cohen Grocery Co.*, 255 U. S. 81 (1921) (statute forbade the making of "any unjust or unreasonable rate or charge in handling or dealing with any necessities"); *Collins v. Kentucky*, 234 U. S. 634 (1914)

Illustrations of this same method of reasoning may be found in areas other than business regulation. In *United States v. Petrillo*⁴³ the Supreme Court considered a statute prohibiting any person from coercing a radio broadcaster to hire more employees than he needed. The Court held that the statute was not too vague, for it provided a concrete factual basis for determining the legality of conduct. Conversely, the Court in *Winters v. New York*⁴⁴ struck down on the ground of vagueness a statute prohibiting the distribution of reading matter containing stories of crime which would incite depraved crimes against the person. The New York Court of Appeals had previously construed the statute to mean the distribution of stories ". . . so massed as to become vehicles for inciting violent and depraved crimes against the person . . ." ⁴⁵ However, the nation's highest Court felt that it was too nebulous a test to require a person under the pain of criminal liability to determine whether the material he had assembled was so arranged as to cause the undesirable result.

While it is true that a statute must establish a standard of guilt, that standard need not be so specific where the statute requires that the conduct be knowingly done,⁴⁶ for it is presumed that the accused intended the reasonable and probable consequences of his conduct.⁴⁷ Since Section 4-a requires that the forbidden conspiracy be knowingly entered, it would seem that an accused cannot complain, if convicted, on the ground that he was not aware that his conduct was unlawful.⁴⁸ Where the statute has established some standard, it is not a defense that the accused has mistaken the character of his conduct for, as Mr. Justice Holmes has said: ". . . the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree."⁴⁹

If, as has been previously indicated, Section 4-a is limited to the punishment of conspiracies aimed only at the forceful disestablishment of the existing government, the use of the terms "substantially contributing" should have ample meaning to those who approach a breach of the section.

(statute forbade merchants from withdrawing from selling pool to sell products at less than "real" value).

⁴³ 332 U. S. 1 (1947).

⁴⁴ 333 U. S. 507 (1947).

⁴⁵ *People v. Winters*, 294 N. Y. 545, 550, 63 N. E. 2d 98, 100 (1945).

⁴⁶ *Screws v. United States*, 325 U. S. 91 (1945); *Gorin v. United States*, 312 U. S. 19 (1941).

⁴⁷ *Cleveland v. United States*, 329 U. S. 14, *rehearing denied*, 329 U. S. 830 (1946); *United States v. Betteridge*, 43 F. Supp. 53 (N. D. Ohio 1942).

⁴⁸ "A mind intent upon willful evasion is inconsistent with surprised innocence." *United States v. Ragen*, 314 U. S. 513, 524 (1942).

⁴⁹ *Nash v. United States*, 229 U. S. 373, 377 (1913).

IV

Registration

In addition to the sedition provisions an attempt is made in the Act to bring to the surface those elements of our society which are regarded as inherently inimical to the existing form of government. To accomplish this Congress provided for the registration of Communist action⁵⁰ and front organizations.⁵¹ Organizations defined by the law were to register within thirty days of its enactment, within thirty days after becoming an organization within the meaning of the statute, or within thirty days after a final order of the Subversive Activities Control Board requiring the organization to register had been issued.⁵² The registration statement as prepared by the Attorney General must include the name of the organization, the address of its principal office,⁵³ the names and addresses of the officers of such organizations,⁵⁴ and an accounting of the monies received and expended by the organization.⁵⁵ Further, the names and addresses of each individual member of a Communist action organization must be furnished in the statement.⁵⁶ These requirements must be met annually so that the Attorney General's records may be kept up to date.⁵⁷

An individual burden is placed on the member of a Communist action organization to register himself in the event that the organization to which he belongs fails to register,⁵⁸ or he knows that, although it did register, it failed to include his name on its membership list.⁵⁹ Severe penalties are imposed on those organizations and individuals who fail to comply with the registration requirements.⁶⁰

Considered as classification for legislative purposes the registration provisions of the Internal Security Act are by no means an innovation in American legal history. Classification has been adopted as a means of attaining a legislative goal in many diversified fields

⁵⁰ INTERNAL SECURITY ACT § 7(a). Section 3(3) defines a Communist action organization as one which is "... substantially directed, dominated, or controlled by the foreign government or foreign organization controlling the world Communist movement. . . ."

⁵¹ *Id.* § 7(b). Section 3(4) defines a Communist front organization as one "... which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement. . . ."

⁵² *Id.* § 7(c).

⁵³ *Id.* § 7(d) (1).

⁵⁴ *Id.* § 7(d) (2).

⁵⁵ *Id.* § 7(d) (3).

⁵⁶ *Id.* § 7(d) (4).

⁵⁷ *Id.* § 7(e).

⁵⁸ *Id.* § 8(a).

⁵⁹ *Id.* § 8(b).

⁶⁰ *Id.* § 15.

such as taxation,⁶¹ regulation of coal mine operations,⁶² maintaining standards of physicians,⁶³ regulation of resale price of trademarked products,⁶⁴ and traffic control.⁶⁵

Any such classification, however, must not be arbitrary, but must be reasonable and proper with respect to the purpose of the legislation;⁶⁶ otherwise it will be invalidated as in conflict with the constitutional requirement of equal protection.⁶⁷ The courts in reviewing a classification do not inquire into its wisdom, but seek only to discover if there is a reasonable basis for it.⁶⁸ The case of *Bryant v. Zimmerman*⁶⁹ is a leading precedent for classification by registration. There the Supreme Court upheld a New York statute requiring members of secret organizations, particularly the Ku Klux Klan, to register. The statute was enacted primarily to impede those individuals who engaged in activities disruptive of public order, namely, the harassment of certain racial and religious groups. The purpose of the statute was no doubt socially legitimate and the Court found that the means adopted—registration—was not unreasonable to attain its objective.

There is little doubt that it is a legitimate function of Congress to legislate for the preservation of the nation. The means adopted by Congress—classification and registration—are based on the legislative finding of the existence of a dangerous subversive movement within the country.⁷⁰ Although the courts are not bound by this finding,⁷¹ they will probably give much weight to it.⁷² So, unless the court is firmly persuaded that classification by registration is absolutely arbitrary and bears no reasonable relation to securing the desired end, it will uphold the registration provisions in the face of an attack on the ground of classification.⁷³

⁶¹ *State Board of Tax Commissioners v. Jackson*, 283 U. S. 527 (1931); *Alward v. Johnson*, 282 U. S. 509 (1931).

⁶² *Barrett v. Indiana*, 229 U. S. 26 (1913).

⁶³ *Watson v. Maryland*, 218 U. S. 173 (1910).

⁶⁴ *Old Dearborn Distributing Co. v. Seagram's Distiller's Corp.*, 299 U. S. 183 (1936).

⁶⁵ *Sproles v. Binford*, 286 U. S. 374 (1932).

⁶⁶ *Asbury Hospital v. Cass County*, 326 U. S. 207 (1945); *People v. Gidaly*, 35 Cal. App. 2d 758, 93 P. 2d 660 (1939); *Joseph Triner Corp. v. McNeil*, 363 Ill. 559, 2 N. E. 2d 929, *aff'd*, 299 U. S. 183 (1936).

⁶⁷ Although there is no federal equal protection clause, the Fifth Amendment requires equal application of the law in the absence of reasonable grounds for inequality.

⁶⁸ *Borden's Farm Products Co. v. Ten Eyck*, 297 U. S. 251 (1936); *McLean v. Arkansas*, 211 U. S. 539 (1909).

⁶⁹ 278 U. S. 63 (1928).

⁷⁰ INTERNAL SECURITY ACT § 2; H. R. REP. No. 2980, 81st Cong., 2d Sess. 1-2 (1950).

⁷¹ *Manley v. Georgia*, 279 U. S. 1 (1929).

⁷² *Sage Stores v. Kansas*, 323 U. S. 32 (1944); *Mulford v. Smith*, 307 U. S. 38 (1939); *Nebbia v. New York*, 291 U. S. 502 (1934).

⁷³ See *Bailey v. Richardson*, 182 F. 2d 46 (D. C. Cir.), *cert. granted*, 339 U. S. 977 (1950) (constitutionality of Presidential Loyalty Order, Exec. Order No. 9835, upheld).

What are the organizations and who are the individuals required to register? In the event that those required to register fail to do so voluntarily, elaborate machinery begins to operate to force registration. There has been established a Subversive Activities Control Board,⁷⁴ which determines upon the application of the Attorney General whether an organization or individual is required to register.⁷⁵ Whenever the Attorney General has reason to believe that an organization is of the type that must register, he petitions the Board for an order requiring it to register.⁷⁶ Upon receipt of the petition the Board is entitled to receive evidence and issue subpoenas requiring the attendance of witnesses.⁷⁷ All hearings before the Board are public.⁷⁸ Provision is made for a default order in a case where an organization or individual fails to appear.⁷⁹ After evaluating the evidence at the hearing the Board makes a report in writing stating the findings of fact and either issues an order requiring the organization or individual to register⁸⁰ or denies the Attorney General's petition.⁸¹ Provision is made for appeal to the United States Court of Appeals by anyone who is aggrieved by an order of the Board.⁸² The orders of the Board become final upon the expiration of the time fixed for appeal or upon the affirmance of the Board's order by the court.⁸³

The most perplexing problem facing the Board is that of the evidence to be used by it in determining what organization is to be required to register. Congress has provided certain criteria to be used by the Board in ascertaining whether an organization is a Communist action⁸⁴ or Communist front⁸⁵ organization.

⁷⁴ INTERNAL SECURITY ACT § 12(a). The Subversive Activities Control Board will hereinafter be referred to as the Board.

⁷⁵ INTERNAL SECURITY ACT § 12(e).

⁷⁶ *Id.* § 13(a). Section 13(b) provides for a petition by one required to register for cancellation of such order.

⁷⁷ INTERNAL SECURITY ACT § 13(c).

⁷⁸ *Id.* § 13(d) (1).

⁷⁹ *Id.* § 13(d) (2).

⁸⁰ *Id.* § 13(g).

⁸¹ *Id.* § 13(h).

⁸² *Id.* § 14(a).

⁸³ *Id.* § 14(b).

⁸⁴ INTERNAL SECURITY ACT § 13(e) provides: "In determining whether any organization is a 'Communist-action organization,' the Board shall take into consideration—(1) the extent to which its policies are formulated and carried out and its activities performed, pursuant to directives or to effectuate the policies of the foreign government or foreign organization in which is vested, or under the domination or control of which is exercised, the direction and control of the world Communist movement referred to in section 2 of this title; and (2) the extent to which its views and policies do not deviate from those of such foreign government or foreign organization; and (3) the extent to which it receives financial or other aid, directly or indirectly, from or at the direction of such foreign government or foreign organization; and (4) the extent to which it sends members or representatives to any foreign country for instruction or training in the principles, policies, strategy, or tactics of such world Communist movement; and (5) the extent to which it reports to

It is not extraordinary for the legislature to prescribe the kind and type of evidence to be received before various tribunals.⁸⁶ However, it is necessary that there be some rational relationship between the evidence introduced and the ultimate fact to be proved.⁸⁷ There appears to be little reason for believing that the courts will find arbitrary the classification made by Congress.⁸⁸

Nevertheless, the question of the quantity and quality of evidence that must be adduced before an organization can be pronounced Communist is a practical one. It is nowhere specifically stated in the enumeration of criteria that all the criteria must be alluded to in determining the character of an organization, but it is to be noted that the important conjunction "and" joins each criterion to the other in the series.⁸⁹ Construing the presence of the conjunction to mean that the Board must consider each criterion, it is still not required that the Board find the presence of each characteristic before

such foreign government or foreign organization or to its representatives; and (6) the extent to which its principal leaders or a substantial number of its members are subject to or recognize the disciplinary power of such foreign government or foreign organization or its representatives; and (7) the extent to which, for the purpose of concealing foreign direction, domination, or control, or of expediting or promoting its objectives, (i) it fails to disclose, or resists efforts to obtain information as to, its membership (by keeping membership lists in code, by instructing members to refuse to acknowledge membership, or by any other method); (ii) its members refuse to acknowledge membership therein; (iii) it fails to disclose, or resists efforts to obtain information as to, records other than membership lists; (iv) its meetings are secret; and (v) it otherwise operates on a secret basis; and (8) the extent to which its principal leaders or a substantial number of its members consider the allegiance they owe to the United States as subordinate to their obligations to such foreign government or foreign organization."

⁸⁶ INTERNAL SECURITY ACT § 13(f) provides: "In determining whether any organization is a 'Communist-front organization,' the Board shall take into consideration—(1) the extent to which persons who are active in its management, direction, or supervision, whether or not holding office therein are active in the management, direction, or supervision of, or as representatives of, any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and (2) the extent to which its support, financial or otherwise, is derived from any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and (3) the extent to which its funds, resources or personnel are used to further or promote the objectives of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2; and (4) the extent to which the positions taken or advanced by it from time to time on matters of policy do not deviate from those of any Communist-action organization, Communist foreign government, or the world Communist movement referred to in section 2."

⁸⁷ "The rules of evidence, however, are established not alone by the courts but by the legislature. The Congress has power to prescribe what evidence is to be received in the courts of the United States." *Tot v. United States*, 319 U. S. 463, 467 (1943).

⁸⁸ *Tot v. United States*, *supra* note 86; *Manley v. Georgia*, 279 U. S. 1 (1929).

⁸⁹ See note 70 *supra*.

⁹⁰ See notes 84 and 85 *supra*.

ordering an organization to register. Indeed, it is theoretically possible for the Board to issue such an order on finding the presence of but one characteristic. Such a possibility is somewhat objectionable, particularly where one of the criterion is the extent to which the organization under review does not deviate from the Communist "line."

Many organizations would be reluctant to take a stand on any political issue for fear of finding themselves in agreement with the Communists. In this regard there would be a grave possibility of finding a "prior restraint."⁹⁰ Although the general rule of construction contained in the Act that no provision be construed to infringe on free speech might save the registration provisions from this objection,⁹¹ it is suggested that an express provision that no organization be required to register unless the preponderance of evidence indicates its Communistic character would better dispel the objection of "prior restraint." Organizations could then speak freely with less likelihood of their being wrongly pronounced Communistic.

V

Registration of Individuals

An individual who is a member of a Communist action organization is required to register in two given situations: (1) where the organization of which he is a member has failed to register, or (2) where he knows that, although the organization has registered, it has failed to record him as one of its members.⁹² By this provision an individual must publicly identify himself with a subversive group. The Supreme Court recently, in *Blau v. United States*,⁹³ upheld a witness before a federal grand jury in her refusal, on the ground of self-incrimination,⁹⁴ to answer certain questions that would associate her with the Communist Party.⁹⁵ The Court believed that as long

⁹⁰ See *Thomas v. Collins*, 323 U. S. 516 (1944); *Cantwell v. Connecticut*, 310 U. S. 296 (1940).

⁹¹ INTERNAL SECURITY ACT § 1(b).

⁹² *Id.* § 8.

⁹³ 95 L. Ed. 175 (Adv. Ops. 1950).

⁹⁴ U. S. CONST. AMEND. V provides: "No person . . . shall be compelled in any criminal case to be a witness against himself. . . ."

⁹⁵ The questions addressed to the petitioner were: "Mrs. Blau, do you know the names of the State officers of the Communist Party of Colorado?" "Do you know what the organization of the Communist Party of Colorado is, the table of organization of the Communist Party of Colorado?" "Were you ever employed by the Communist Party of Colorado?" "Did you ever have in your possession or custody any of the books and records of the Communist Party of Colorado?" "Did you turn the books and records of the Communist Party of Colorado over to any particular person?" "Do you know the names of any persons who might now have the books and records of the Communist Party of Colorado?" "Could you describe to the grand jury any books and records of the Communist Party of Colorado?" (Court's footnote No. 1.)

as the Smith Act⁹⁶ sought to punish persons who knowingly taught or advocated the forceful overthrow of the government, or who organized or helped to organize any group which taught or advocated such overthrow of the government, or who joined such an organization with knowledge of its purposes, the prosecution of the petitioner was more than a "mere imaginary possibility." The Court also said that it was immaterial that the responses to the questions would not have supported a conviction under a criminal statute; to excuse the petitioner it was only necessary that the answers "... would have furnished a link in the chain of evidence needed in a prosecution of petitioner for violation of (or conspiracy to violate) the Smith Act."⁹⁷

Unlike the petitioner's situation in the *Blau* case a registrant under the Internal Security Act is afforded some protection against the consequences of his registration in that the fact of his registration may not be received in evidence against him in a criminal prosecution.⁹⁸ A witness may be relieved of his constitutional privilege to remain silent in the face of incriminating questions and forced under penalty of contempt to answer those questions, provided he is granted an immunity from the consequences of answering coextensive with his constitutional right.⁹⁹ Thus a statute which merely provided that testimony given shall not be introduced against the witness in a subsequent criminal proceeding was held to be inadequate on the ground that the testimony solicited could be used to uncover other evidence against him.¹⁰⁰ The courts, however, have upheld statutes which completely immunize the testifier against any prosecution growing out of the information he might be compelled to give.¹⁰¹

Since the *Blau* case has specifically held that one need not answer questions which would possibly lead to the uncovering of other evidence that may be used to prosecute him under the Smith Act, it would seem that the registration provisions must offer a similar safeguard to those individuals required to register.

To afford this protection the immunity clause of the Internal Security Act should be extended to save a registrant from prosecution for crimes under the Smith Act that might be established as a result of his registration. This immunity need not extend to all possible crimes under the Smith Act but only to those for which a prosecution presents a substantial, and not fanciful or remote danger

⁹⁶ 18 U. S. C. § 2385 (1948).

⁹⁷ *Blau v. United States*, 95 L. Ed. 175, 176 (Adv. Ops. 1950).

⁹⁸ INTERNAL SECURITY ACT § 4(f).

⁹⁹ *Glickstein v. United States*, 222 U. S. 139 (1911); cf. *Counselman v. Hitchcock*, 142 U. S. 547 (1892).

¹⁰⁰ *Arndstein v. McCarthy*, 254 U. S. 7 (1920); *In re Nachman*, 114 Fed. 995 (D. C. S. C. 1902); *In re Watson*, 293 Mich. 263, 291 N. W. 652 (1940). *Contra*: *United States v. Williams*, 28 Fed. Cas. 670, No. 16, 717 (S. D. Ohio 1872).

¹⁰¹ *Hale v. Henkel*, 201 U. S. 43 (1906); *Brown v. Walker*, 161 U. S. 591 (1896).

to the registrant.¹⁰² Although the Court in the *Blau* case refers only generally to the Smith Act, it is submitted that, because of the tenor of the questions put to the petitioner,¹⁰³ which were aimed at establishing the petitioner's affiliation with the Communist Party and knowledge of its internal affairs, the Court in effect held that the petitioner by answering the questions would have provided a link in the chain of evidence necessary to prosecute her for the crimes of organizing a subversive group or joining one that had for its purpose the forceful overthrow of the government. The Court did not necessarily hold that the same answers provided a link which would have led to her prosecution for the crime of *personally* teaching or advocating the need or propriety of forcefully overthrowing the government. This is so, because the type of evidence necessary for prosecution under the latter crime is different in that it must show actual espousal of subversive ideas and not mere adherence to a subversive group.¹⁰⁴ The connection between petitioner's answers and a prosecution for this latter crime is more remote and does not present a real danger. At least, the Court did not have to find that it did for a successful disposition of the case.

Hence, it is submitted that the immunity provision of the Internal Security Act, in order to meet the constitutional test, be broadened so as to prohibit prosecution of any registrant for the crimes (under the Smith Act) of organizing or joining a group which has for its purpose the forceful overthrow of government. It is further submitted that if the *Blau* case is limited in its application to these crimes, it is not necessary to provide that a registrant not be prosecuted for the crime of personally advocating the overthrow of government.

Even if the *Blau* case were construed to have application to the crime of personally teaching or advocating the desirability of forcefully overthrowing the government, still it is submitted that mere registration does not put the registrant in anything but a remote danger of prosecution for such crime. The registrant will merely admit membership in a Communist action organization. This information could lead to an investigation of his connection with it, whether he organized it, and under what conditions he joined it. Then if its purposes are found to be illegal he stands in the danger of prosecution for organizing or joining a subversive group. But the admission of membership will lead only in a remote way to prosecution for personally teaching or advocating the need for forcefully overthrowing the government, for the evidence necessary must pinpoint his very act of so teaching or advocating. His membership in a subversive group does not constitute the crime; it only indirectly and remotely provides evidence of his political disposition. It does not without fail lead to evidence that he at a particular time and place taught

¹⁰² See *Mason v. United States*, 244 U. S. 362 (1917); *United States v. Weinberg*, 65 F. 2d 394 (2d Cir. 1933).

¹⁰³ See note 95 *supra*.

¹⁰⁴ See *United States v. Dennis*, 183 F. 2d 201 (2d Cir. 1950).

subversive doctrine. More specific evidence is needed to prove that; and such evidence is not always so closely connected with membership in a subversive organization that the danger to registrants can be considered imminent. At least, the danger cannot be deemed so imminent as to condemn the entire system of registration.

VI

Consequences of Registration

The consequences of registration are several. They affect both the organizations required to register and the individual members of those organizations.

Organizations required to register are denied certain tax exemptions¹⁰⁵ and are required to "label" their propaganda.¹⁰⁶ The labelling provision makes it unlawful for any organization registered or required to register to send through the United States mail or through any means of interstate or foreign commerce any publication unless it is clearly identified as originating with a Communist organization, or to broadcast over radio or television without similarly identifying the source of the material.

It was early decided that Congress had the authority to exclude certain matter from the United States mails.¹⁰⁷ This authority was said to rest on the proprietary character of the government's interest in the mail service in cases where the matter could be excluded by a legitimate exercise of the police power.¹⁰⁸ Soon the same reasoning was extended to cases involving matter of an intellectual or political nature.¹⁰⁹ Congress has had a similar power to exclude from other channels of interstate or foreign commerce matter which was regarded as being productive of harmful results.¹¹⁰

All of these cases have involved discrimination against the material itself in that certain conditions were placed upon its passage. The Internal Security Act does not go so far; it merely requires identification of the author. This condition, of course, is imposed to make the public aware of the sponsor of the ideas contained in a given publication. To the extent that identification may dissuade

¹⁰⁵ INTERNAL SECURITY ACT § 11(b).

¹⁰⁶ *Id.* § 10.

¹⁰⁷ *Ex parte* Jackson, 96 U. S. 727 (1877).

¹⁰⁸ *Lewis Publishing Co. v. Morgan*, 229 U. S. 288 (1913); *Public Clearing House v. Coyne*, 194 U. S. 497 (1904).

¹⁰⁹ *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson*, 255 U. S. 407 (1921) (newspaper articles denouncing United States' participation in war); *Burleson v. United States ex rel. Workingmen's Co-op. Pub. Association*, 274 Fed. 749 (D. C. Cir. 1921) (newspaper advocated overthrow of government by arson, murder, and assassination); *Masses Publishing Co. v. Patten*, 246 Fed. 24 (2d Cir. 1917) (articles urged defiance of conscription laws).

¹¹⁰ *United States v. Handler*, 142 F. 2d 351, *cert. denied*, 323 U. S. 741 (1944).

the public from subscribing to literature authored by Communist organizations it may be condemned by some as an infringement on the rights of free speech. But this can hardly be considered an infringement within the meaning of the Constitution, for that document does not guarantee a speaker an audience, but only the right to utter his words. Under the provisions of the Act an organization is not limited in the expression of its ideas; it is only required to identify those ideas.

The consequences of the registration of an organization on an individual member are twofold: he is required to divulge his membership in such organization if he is seeking or holding a federal non-elective post,¹¹¹ and further, he is forbidden to apply for or use a passport.¹¹²

These provisions will quite likely be subject to attack as "bills of attainder" in that the legislature is singling out individuals, or an ascertainable group of individuals, for punishment without judicial trial.¹¹³ Legislative attempts to punish have been repeatedly denounced as unconstitutional¹¹⁴ since the legislature is confined to the task of formulating the law and may not enforce it. Since the prohibitions against the individuals are legislatively enacted, they must be examined to determine if they constitute a form of punishment.

The requirement that members of Communist organizations divulge their membership in seeking or holding a federal job,¹¹⁵ admittedly, will much diminish their employment opportunities, for the obvious purpose of the section is to exclude from government employment those regarded as security risks.

Recently, the case of *United States v. Lovett*¹¹⁶ struck down as unconstitutional a statute which provided that no federal funds be payable to certain individuals. The statute was passed to effectuate the dismissal of several federal employees over the continuous objection of their executive superiors. The Supreme Court held that the statute was an attempt at legislative punishment. By so ruling the Court recognized that discharge from federal employment could be a form of punishment.

However, the decision is not to be read as depriving Congress of the right to establish certain conditions for employment with the government. The government has the right to be selective in the employees it engages,¹¹⁷ even to the extent of requiring them not

¹¹¹ INTERNAL SECURITY ACT § 5(a).

¹¹² *Id.* § 6(a).

¹¹³ See *United States v. Lovett*, 328 U. S. 303 (1946).

¹¹⁴ *Duncan v. Kahanomoku*, 327 U. S. 304 (1946); *Ex parte Garland*, 71 U. S. 333, 366 (1867).

¹¹⁵ INTERNAL SECURITY ACT § 5(a).

¹¹⁶ 328 U. S. 303 (1946).

¹¹⁷ *Heim v. McCall*, 239 U. S. 175 (1915).

to engage in political activities.¹¹⁸ Nor does one have a vested right in a government job, since he may be subjected to certain conditions both in seeking and retaining the employment.¹¹⁹

Since the government does have the right to establish conditions for the securing or retaining of employment with it, it seems that its exercise of such right in the interests of its own security should hardly be deemed punishment within the meaning of the *Lovett* case.¹²⁰

It is further provided that a member of a Communist organization may not procure or use a passport.¹²¹ The purpose of this enactment is to disrupt the Communist system of international communication and to prevent the American passport from becoming a mere tool in the hands of Communists.¹²² The regulation of foreign travel has long been regarded as a sovereign function.¹²³ It has been previously recognized as such by the United States in the passage of the War Service Passport Act of 1918.¹²⁴

For the most part, the Secretary of State has the sole discretion concerning the issuance of passports.¹²⁵ The exercise of this discretion is not ordinarily subject to judicial attack. But where an officer has arbitrarily refused to grant a passport his decision may be overturned.¹²⁶

Since the courts have recognized a wide range of governmental discretion in this matter, it hardly seems likely that they would refuse to uphold the ban on Communist travel on the premise that it constitutes a bill of attainder.

¹¹⁸ *Oklahoma v. United States Civil Service Commission*, 330 U. S. 127 (1947); *United States Public Workers v. Mitchell*, 330 U. S. 75 (1947).

¹¹⁹ *McAuliffe v. New Bedford*, 155 Mass. 216, 29 N. E. 517 (1892). Mr. Justice Holmes said in upholding the dismissal of petitioner from his job for soliciting money for political purposes in violation of the regulations of his employment: "The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." *Id.* 29 N. E. at 517.

¹²⁰ See *Bailey v. Richardson*, 182 F. 2d 46 (D. C. Cir.), *cert. granted*, 339 U. S. 977 (1950) (upholding Presidential Loyalty Order); *Lederman v. Board of Education*, 276 App. Div. 527, 96 N. Y. S. 2d 466 (2d Dep't), *aff'd*, 301 N. Y. 476 (1950) (upheld statute banning membership in certain organizations as a condition for employment in the public school system).

¹²¹ INTERNAL SECURITY ACT § 6(a).

¹²² Solow, *Stalin's American Passport Mill*, 47 AMERICAN MERCURY 187, 302 (July 1939).

¹²³ *Rex v. Brailsford*, [1905] 2 K. B. 730, 745.

¹²⁴ 40 STAT. 559 (1918), as amended, 55 STAT. 252-3 (1941), 22 U. S. C. § 223-6 (1946).

¹²⁵ *United States ex rel. London v. Phelps*, 22 F. 2d 288 (2d Cir. 1927).

¹²⁶ *Perkins v. Elg*, 307 U. S. 325 (1939).

VII

Immigration

A sovereign power has the right to exclude citizens of other nations from its borders.¹²⁷ This prerogative has been statutorily implemented in the United States for the purpose of excluding anarchists, those who advocated forceful overthrow of government, or those who belonged to organizations which advocated the same.¹²⁸ The Internal Security Act has for its purpose the extension of the provisions excluding certain types of aliens.¹²⁹ In effectuating its purpose it excludes those aliens who seek entry to engage in activities prejudicial to the public interest,¹³⁰ and those aliens who, it is reasonable to believe, will engage in activities in opposition to the form of government established in the United States or who will join organizations required to register under other provisions of the Act.¹³¹

These prospective provisions do not exhaust the coverage of the Act. It is further provided that "aliens who at any time shall be or shall have been members" of or affiliated with any totalitarian party are to be barred from entry.¹³² Hence it is possible to exclude an alien on the mere basis of his past affiliations no matter what his current sentiments might be.

The Justice Department, having supervision of alien immigration¹³³ and guided by the Act's mandate that no person may be admitted who is made inadmissible by the provisions of the Act,¹³⁴ has given a literal construction to the exclusionary provisions in some cases.¹³⁵ This limitation placed on the executive discretion might well have ironic consequences in that fugitives from a totalitarianism that they have renounced may be technically excluded by reason of their past affiliations. The limitation has already produced some clash between the executive and the legislature.¹³⁶ Further, the broad ban

¹²⁷ United States *ex rel.* Polymeris v. Trudell, 284 U. S. 279 (1932).

¹²⁸ 40 STAT. 1012 (1918), as amended, 8 U. S. C. § 137 (1946). The denial of admission to an alien anarchist is not a violation of a constitutional right. United States v. Parson, 22 F. Supp. 149 (S. D. Cal. 1938).

¹²⁹ INTERNAL SECURITY ACT § 22. This section largely rewrites the Act of October 16, 1918, 40 STAT. 1012, as amended, 8 U. S. C. § 137 (1946). Since Section 22 causes a direct amendment it will be cited hereafter as 40 STAT. 1012 (1918), as amended, 8 U. S. C. A. § 137 (Supp. 1950).

¹³⁰ *Id.* § 1(1). The phrase "prejudicial to the public interest" is quite likely adopted from a refusal to allow entry to any alien if it "would be prejudicial to the interests of the United States" contained in the Presidential Proclamation No. 2523 of November 14, 1941, issued pursuant to 22 U. S. C. § 223. This provision was upheld in *Knauff v. Shaughnessy*, 338 U. S. 537 (1950).

¹³¹ 40 STAT. 1012 (1918), as amended, 8 U. S. C. A. § 137(3) (Supp. 1950).

¹³² *Id.* (2).

¹³³ 32 STAT. 828 (1903), as amended, 8 U. S. C. § 131 (1946).

¹³⁴ 40 STAT. 1012 (1918), as amended, 8 U. S. C. A. § 137 (Supp. 1950).

¹³⁵ See N. Y. Times, Oct. 10, 1950, p. 5, col. 3; N. Y. Times, Oct. 11, 1950, p. 1, col. 1.

¹³⁶ See N. Y. Times, Jan. 28, 1951, p. 34, col. 3, wherein is reported Attorney

on former members of totalitarian parties has met with international reaction.¹³⁷

Although the United States has, as a sovereign, absolute power to exclude an alien upon any condition,¹³⁸ it would seem that the conditions contained in the Internal Security Act are productive of much domestic and international ill-will. Perhaps it would be wiser for Congress to allow the Justice Department a wider discretion in this matter, or at least clarify its intent so as to remove the many thorny issues that have arisen.¹³⁹

VIII

Naturalization Provisions

The Internal Security Act undertakes to enlarge the class of persons who may be denied the privilege of becoming naturalized citizens of the United States.¹⁴⁰ Related to these new regulations is a provision which seeks to make easier the government's task of revoking the citizenship of certain people. Any person who within five years of his naturalization (if it was after January 1, 1951) joins a Communist organization shall be deemed *prima facie* not to have been attached to the principles of the Constitution at the time of his naturalization.¹⁴¹ Unless this *prima facie* evidence is successfully rebutted the citizen's "papers" may be revoked on the ground of fraud.

There is statutory authorization for revocation of citizenship obtained through fraud.¹⁴² Non-attachment to the principles of the Constitution at the time of naturalization is such a fraud.¹⁴³ Often the fraudulent state of mind of a citizen at the time of his naturalization must be proved by his subsequent conduct.¹⁴⁴ However, since the courts are not very receptive to this type of evidence,¹⁴⁵ it must be "clear, unequivocal, and convincing."¹⁴⁶ The acts and statements

General McGrath's defense of the Justice Department's implementation of the exclusionary provisions of Section 22.

¹³⁷ N. Y. Times, Feb. 5, 1951, p. 5, col. 4, wherein it is reported that Spain has criticized the exclusion of its citizens.

¹³⁸ *Nicoli v. Briggs*, 83 F. 2d 375 (10th Cir. 1936).

¹³⁹ President Truman has already signed an amendment to Section 22 excluding from its coverage those who became members of Nazi, Fascist, or Communist organizations before they were sixteen years old, and those who became members of such organizations for purposes of obtaining employment, food rations, and other essentials of life. N. Y. Times, Mar. 29, 1951, p. 25, col. 1.

¹⁴⁰ Section 25 of the Internal Security Act amends Section 305 of the Nationality Act of 1940, 54 STAT. 1141 (1940), 8 U. S. C. § 705 (1946).

¹⁴¹ 54 STAT. 1141 (1940), as amended, 8 U. S. C. A. § 705 (d) (Supp. 1950).

¹⁴² 54 STAT. 1158 (1940), as amended, 8 U. S. C. § 738 (1946).

¹⁴³ *United States v. Swelgin*, 254 Fed. 844 (D. C. Ore. 1918).

¹⁴⁴ *United States v. Wilmovski*, 56 F. Supp. 63 (N. D. Ind. 1943).

¹⁴⁵ *Baumgartner v. United States*, 322 U. S. 665 (1944).

¹⁴⁶ *Knauer v. United States*, 328 U. S. 654 (1946).

of a citizen subsequent to his naturalization indicating his continued loyalty to his native country have been found sufficient to meet the high standard of proof required.¹⁴⁷

The courts have upheld a statute similar to the one under review in the case of *Luria v. United States*.¹⁴⁸ There a statute provided that the establishment of a permanent foreign residence by a naturalized citizen within five years of his naturalization was to be deemed prima facie evidence of his fraudulent state of mind. The Court emphasized the fact that the statute merely pronounced a rule of evidence and did not establish substantive rights. The presumption raised by the statute could be easily rebutted by showing that the reason for establishing a permanent foreign residence was not inconsistent with an honest desire to be a bona fide American citizen.¹⁴⁹ Of course, by such a procedure the burden is thrown on the citizen to show that his state of mind was honest at the time he accepted citizenship. But this does not seem unwarrantable, especially when it is considered that a petitioner for American citizenship must initially assert his adherence to the Constitution.¹⁵⁰

It would seem that where the naturalized citizen is given opportunity to rebut the presumption by proof that his subsequent membership in a Communist organization does not negate his possession at the time of his naturalization of a well disposed attitude toward constitutional principles, no right in him is invaded.

No effort has been made to discuss the wisdom behind the enactment of the Internal Security Act. Perhaps time is the only true judge of its merit. But whether the Congress was wise or not, it has sown a fertile field for constitutional questions. Many such questions have been argued in Congressional debate, in legal and political periodicals, in newspapers and magazines, and in everyday topical discussion. Of course, no conclusive results have been derived from these polemics, mainly for the reason that they are necessarily cast in the abstract.

A final resolution of the problems inherent in the legislation must be found in the courts, where the advantages will be had of applying the statute to a particular factual situation. Then when the issue is properly raised the court can decide whether the statute applies and if it does, whether it meets the test of constitutionality.

¹⁴⁷ *United States v. Kramer*, 262 Fed. 395 (5th Cir. 1919).

¹⁴⁸ 231 U. S. 9 (1913).

¹⁴⁹ *United States v. Patterson*, 4 F. Supp. 693 (D. C. Mont. 1933).

¹⁵⁰ 54 STAT. 1157 (1940), as amended, 8 U. S. C. A. § 735 (Supp. 1950).